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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
08/044,240	04/07/1993	MICHAEL MC HALE	1391-1275	6731

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EXAMINER
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SHERRER, CURTIS EDWARD

ART UNIT	PAPER NUMBER
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1761

DATE MAILED: 05/29/2002

34

Please find below and/or attached an Office communication concerning this application or proceeding.

TC-34

# Office Action Summary

Application No.  
08/044,240

Applicant(s)  
McHale et al.

Examiner  
Curtis E. Sherrer

Art Unit  
1761



-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

## Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136 (a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

## Status

- 1) ☒ Responsive to communication(s) filed on 03/17/00 (decision by the Board of Appeals)
- 2a) ☐ This action is FINAL. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11; 453 O.G. 213.

## Disposition of Claims

- 4) ☒ Claim(s) 1-56 is/are pending in the application.
- 4a) Of the above, claim(s) 7, 11-14, 16, 17, 23-27, and 29-50 is/are withdrawn from consideration.
- 5) ☒ Claim(s) 8, 10, 18-21, and 51-56 is/are allowed.
- 6) ☒ Claim(s) 1-6, 9, 15, 22, and 28 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claims \_\_\_\_\_ are subject to restriction and/or election requirement.

## Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
- 11) ☐ The proposed drawing correction filed on \_\_\_\_\_ is: a) ☐ approved b) ☐ disapproved by the Examiner.  
If approved, corrected drawings are required in reply to this Office action.
- 12) ☐ The oath or declaration is objected to by the Examiner.

## Priority under 35 U.S.C. §§ 119 and 120

- 13) ☐ Acknowledgement is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).  
a) ☐ All b) ☐ Some\* c) ☐ None of:  
1. ☐ Certified copies of the priority documents have been received.  
2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_  
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).  
\*See the attached detailed Office action for a list of the certified copies not received.
- 14) ☐ Acknowledgement is made of a claim for domestic priority under 35 U.S.C. § 119(e).  
a) ☐ The translation of the foreign language provisional application has been received.
- 15) ☐ Acknowledgement is made of a claim for domestic priority under 35 U.S.C. §§ 120 and/or 121.

## Attachment(s)

- 1) ☐ Notice of References Cited (PTO-892) 4) ☐ Interview Summary (PTO-413) Paper No(s). \_\_\_\_\_
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948) 5) ☐ Notice of Informal Patent Application (PTO-152)
- 3) ☐ Information Disclosure Statement(s) (PTO-1449) Paper No(s). \_\_\_\_\_ 6) ☐ Other:

### Part III DETAILED ACTION

The instant application is re-opened for prosecution because, while the Board of Patent Appeals and Interferences has found the claims directed to an undulating pattern of the second mass to be allowable, other members of the Markush group have yet to be examined. The claims containing allowable subject matter are 8, 10, 18-21 and 51-56. The restricted claims are 7, 11-14, 16, 17, 23-27, 29-50. The next Markush member that will be examined is “a pattern of stripes across a width of the [sheeted chewing gum] product” as recited in claim 1. This limitation is embodied in claims 1-6, 9, 15, 22, and 28.

#### *Claim Rejections - 35 USC § 112*

1. The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

2. Claims 1-6, 8-10, 15, 18-22, 28, and 51-56 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

Claim 53 is considered indefinite because it is unclear how it further limits Claim 51, i.e., Claim 51 is directed to multi colored chewing gum.

Claim 56 is indefinite because it is unclear how the process limitations further limit product Claim 51.

Claims 1, 15, 18, 20, and 21 use the term “generally” in describing a physical characteristic of the product and the scope of this term is unknown.

***Claim Rejections - 35 USC § 102***

3. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless --

4. Claims 15 are rejected under 35 U.S.C. 102(b) as being anticipated by Huzinec or Faust (Design Pat. Nos. 271,535 and 271,344, respectively).

5. Huzinec and Faust disclose two color chewing gums that are designed so that a second mass of chewing gum is imbedded into a first mass of chewing gum. While the design patent does not disclose the process by which it was made, the process limitations are not found to be limiting.

***Claim Rejections - 35 USC § 103***

6. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

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7. Claims 1-6, 9, 22 and 28 are rejected under 35 U.S.C. 103(a) as being unpatentable over Huzinec or Faust in view of Jones (U.S. Pat. No. 1,855,145) and in further view of applicants' admissions (page 1 of specification).

8. Huzinec or Faust teach that cited above, i.e., two layer chewing gums, with one imbedded in the other, so that the top layer is not viewable from the bottom. They do not teach the upper layer (second mass) being in a pattern of stripes across a width.

9. Jones teaches the production of an edible article that is made of two different masses of different colors and flavors where the upper mass is cannot be seen from below and is in the shape of a stripe. See fig. 10, page 1, lines 1-39, 50-56 and page 2, lines 35-39. It would have been obvious to those of ordinary skill in the art to modify the chewing gums of Huzinec or Faust to resemble the confectionary of Jones, e.g., present the second mass in the form of a striped pattern because as the consumer bites the gum "a changed composition is encountered." (Page 1, lines 34-39).

10. None of the cited art teaches the production of gum in a rolled up tape configuration or as a plurality of stripes. Applicants admit the prior existence of a product called BUBBLETAPE™, whereby bubble gum is rolled up in a tape. (Page 1, lines 10-14). It would have been obvious to those of ordinary skill in the art to modify the chewing gums of Huzinec or Faust in view of Jones so that they would be in the form of a rolled up tape in order to provide

more interest to the consumer. In such a form, there would have to be a plurality of stripes so that the teaching of Jones would be realized, i.e., "a changed composition is encountered."

11. There is further motivation to produce a gum with diagonal stripes, as also evidenced by applicants' admissions. On page 1, of the instant specification, applicants admit that FRUIT STRIPES™ uses diagonal dyed stripes and therefore, this pattern is well known in the gum industry. It therefore would have been obvious to those of ordinary skill in the art to produce the gums of Huzinec or Faust in view of Jones in the pattern admitted to by applicants because it is a desired appearance.

12. Finally, Applicants' attention is invited to *In re Levin*, 84 U.S.P.Q. 232 and the cases cited therein, which are considered in point in the fact situation of the instant case, and wherein the Court stated on page 234 as follows:

This court has taken the position that new recipes or formulas for cooking food which involve the addition or elimination of common ingredients, or for treating them in ways which differ from the former practice, do not amount to invention, merely because it is not disclosed that, in the constantly developing art of preparing food, no one else ever did the particular thing upon which the applicant asserts his right to a patent. In all such cases, there is nothing patentable unless the applicant by a proper showing further establishes a coaction or cooperative relationship between the selected ingredients which produces a new, unexpected, and useful function. *In re Benjamin D. White*, 17 C.C.P.A. (Patents) 956, 39 F.2d 974, 5 U.S.P.Q. 267; *In re Mason et al.*, 33 C.C.P.A. (Patents) 1144, 156 F.2d 189, 70 U.S.P.Q. 221.

### ***Conclusion***

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13. Any inquiry concerning this communication or earlier communications from the examiner should be directed to Curtis Sherrer whose telephone number is (703) 308-3847. The examiner can normally be reached on Tuesday through Friday from 6:30 to 4:30. The **fax phone number** for this Group is (703)-305-3602.

14. Any inquiry of a general nature or relating to the status of this application should be directed to the Group receptionist whose telephone number is (703) 308-0661.



Curtis E. Sherrer  
Primary Examiner  
May 16, 2002